Case No. 80-6369

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RECEIVED
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SUPREME COURT, U.S.

ANTHONY RAY PEEK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, ANTHONY RAY PEEK, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. The Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Paul C. Helm
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Bartow, Florida 33830
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COUNSEL FOR PETITIONER

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AFFIDAVIT

I, ANTHONY RAY PEEK, being first duly sworn accord-to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the Petitioner in the above entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted of first degree murder, sexual battery, grand larceny, and burglary and sentenced to death by the Circuit Court for Polk County, Florida. On direct appeal, the Supreme Court of Florida affirmed the judgment and sentence. I am now petitioning this Court for a writ of certiorari to the Supreme Court of Florida.

Anthony Ray Peek
ANTHONY RAY PEEK

Duly witnessed and sworn to before me, a Notary Public, this 5 day of Feb. 1981.

Ricky K Mays
NOTARY PUBLIC

My commission expires:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPT. 15, 1984

Case No. 80-6369

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ANTHONY RAY PEEK,

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vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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TENTH JUDICIAL CIRCUIT

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STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, ANTHONY RAY PEEK, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered on October 30, 1980, rehearing denied on January 27, 1981.

QUESTIONS PRESENTED

I. Whether Petitioner's conviction for first degree murder, sexual battery, grand larceny, and burglary violated the Due Process Clause of the Fourteenth Amendment because the State's evidence failed to prove Petitioner's guilt beyond a reasonable doubt?

II. Whether the death sentence violated the Eighth and Fourteenth Amendments because the trial court relied upon nonstatutory and improper aggravating circumstances, and the Supreme Court of Florida failed to insure consistency in the administration of the death penalty?

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OPINION BELOW

The opinion of the Supreme Court of Florida and order denying rehearing are unreported and are set out in Appendix A.

JURISDICTION

The opinion of the Supreme Court of Florida was filed on October 30, 1980. Petitioner's timely motion for rehearing was denied on January 27, 1981, and this petition for certiorari was filed within sixty days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3). Petitioner asserted below and is asserting here deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States, which are set out in Appendix B.

2. This case involves Section 921.141, Florida Statutes (1977), which is set out in Appendix C.

STATEMENT OF THE CASE

Petitioner was charged with first degree murder, sexual battery, grand larceny, and burglary in the Circuit Court in and for Polk County, Florida. Testimony at Petitioner's trial in April, 1978, established the following facts:

Erna L. Carlson returned to her home in Winter Haven, Florida, following a visit with relatives at approximately 9:00 p.m. on May 21, 1977. At 8:30 a.m. the following morning, Mrs. Carlson's body was discovered in her bedroom

with her robe and part of a bedspread tied tightly around her neck. The screens on the door to the porch and on the door leading from the porch to the house had been cut, and a piece of stocking containing a strand of negroid hair was found in the garage. The victim's pajama bottoms contained blood and seminal fluid stains. No fingerprints were found in the house.

On May 22, 1977, police located Mrs. Carlson's automobile at a lakeside park approximately one mile from her home. The door to the driver's side was locked, the passenger door was not. The keys to the automobile were in the glove compartment. Fingerprints were found on the inside of the driver's side window.

Prompted by allegations that Petitioner had been going door to door seeking employment in the Winter Haven area, Officer Donnelly of the Winter Haven Police Department interviewed him several days after the murder. Petitioner lived in a supervised halfway house at the time of the crime. He told Donnelly that he had returned to the halfway house before 11:00 p.m. on the night of May 21, 1977, and had not been in the vicinity of Mrs. Carlson's home or of the lakeside park. Petitioner voluntarily permitted the taking of his fingerprints and the extraction of hair samples. The hair samples were sent to the Sanford Crime Lab for comparison but were lost subsequent to the testing.

Dr. Luther Youngs testified that Mrs. Carlson died of strangulation. She also had been raped and had suffered two fractured ribs. An employee from the Sanford Crime Lab testified that the hair samples obtained from Petitioner were consistent in microscopic appearance to the hair found in the stocking at the scene of the crime. Although it is never possible to say that two hairs are identical, the hairs of only approximately two out of every 10,000 persons exhibit consistent microscopic characteristics.

The blood and seminal fluid stains taken from Mrs. Carlson's pajamas were from an individual with type O secretor blood; Petitioner is a type O secretor. Thirty-three or thirty-four percent of the male population are type O secretors. The evidence further revealed that the fingerprints found inside Mrs. Carlson's car matched those of Petitioner.

Petitioner took the stand and, with one significant exception, reiterated the account first given to Officer Donnelly. He contradicted, however, his prior assertion that he was not in the area where the victim's car was found on May 22, 1977. Petitioner testified instead that on that morning he rode his bicycle to the lakeside park. Noticing a car parked nearby with the door unlocked, he opened the door and searched the glove compartment, after which he rode his bicycle back to the halfway house.

Petitioner moved for a judgment of acquittal on the ground that the evidence was insufficient to establish the criminal agency of the Petitioner. The trial court denied the motion. The jury found Petitioner guilty of all four offenses and recommended a sentence of death on the murder charge. On May 2, 1978, the court adjudged Petitioner guilty and sentenced him to death for first degree murder and consecutive terms of imprisonment for life for sexual battery, five years for grand larceny, and five years for burglary. In support of the death sentence, the trial court found five aggravating circumstances: (1) The murder was committed while Petitioner was on probation. (2) Petitioner was previously convicted of felonies which involved the use or threat of violence to the victim. (3) The murder was committed while Petitioner was actively engaged in the commission of a sexual battery. (4) The murder was committed for pecuniary gain. (5) The murder was heinous, atrocious, and cruel. The court found no mitigating circumstances, specifically rejecting Petitioner's age at the time of the offense, which was nineteen.

On appeal to the Supreme Court of Florida Petitioner argued, inter alia, that the evidence failed to establish his guilt beyond a reasonable doubt, that his age should have been considered a mitigating factor, that it was error to regard Petitioner's probationary status as being within the aggravating circumstance set forth in Section 921.141(5)(a), Florida Statutes (1977), and that the trial court erred in finding that the capital felony was committed for pecuniary gain. The Supreme Court of Florida affirmed the trial court's judgment and sentences. The court held that the evidence relating to the matching fingerprints, the hair comparison, and the blood and semen analysis enabled the jury to conclude that Petitioner's guilt was proven beyond a reasonable doubt. The court found that the record supported the trial court's rejection of Petitioner's age as a mitigating factor. The court also found that the trial court's improper consideration of the two aggravating circumstances concerning pecuniary gain and commission of the offense while on probation did not render the death sentence invalid. Chief Justice Sundberg and Justice England dissented on the ground that the evidence was insufficient to prove beyond a reasonable doubt that Petitioner was the perpetrator of the crime.

In his motion for rehearing, Petitioner asserted that the affirmance of his convictions upon evidence insufficient to establish his guilt beyond a reasonable doubt violated the Due Process Clause of the Fourteenth Amendment. Petitioner also asserted that the death sentence was unconstitutional as applied to him because the trial court's discretion was not restricted to the examination of specific statutory aggravating factors and because the Supreme Court of Florida's affirmance of the death sentence was inconsistent with its reversal of the death sentence in Mikenas v. State, 367 So.2d 606 (Fla.1978). The court denied the motion without opinion.

REASONS FOR GRANTING CERTIORARI

I.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN JACKSON v. VIRGINIA AND IN RE WINSHIP, WHICH REQUIRE PROOF BEYOND A REASONABLE DOUBT TO SUSTAIN A CRIMINAL CONVICTION.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the criminal conviction of any person except on proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307,309, 61 L.Ed.2d 560,567, 99 S.Ct. 2781 (1979); In re Winship, 397 U.S. 358,364, 25 L.Ed.2d 368,375, 90 S.Ct. 1068 (1970). The standard to be applied by a reviewing court in determining whether the evidence was sufficient to sustain the conviction under this requirement of due process is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, supra, at 443 U.S. 319,61 L.Ed.2d 573.

In the present case, no rational trier of fact could have found that the State of Florida proved Petitioner's identity as the perpetrator of the crimes beyond a reasonable doubt. None of the State's evidence placed Petitioner at the scene of the crimes at the time the crimes were committed. See Chief Justice Sundberg's dissent at page 13 of the opinion below, set forth in Appendix A. The blood and seminal fluid stains found on Mrs. Carlson's pajamas could have been placed there by any male with blood type O secretor--thirty-three or thirty-four percent of the male population. The hair fragment from the stocking found in Mrs. Carlson's garage was consistent in microscopic appearance with Petitioner's hair, but the State's own expert could not say the hairs were identical. The hair fragment could have come from two out of every 10,000 person's, or at least fifty-four of the 227,222 residents of

Polk County as of 1970, The Florida Handbook, page 511 (16th Ed. 1977), as well as from untold numbers of non-residents. The State's fingerprint evidence established only that Petitioner had touched Mrs. Carlson's automobile, but not when he touched it. The unlocked automobile was found a mile from the scene of the crimes and could have been touched by many people other than Mrs. Carlson's murderer.

Since no rational trier of fact could find that Petitioner's identity was proven beyond a reasonable doubt, Petitioner was denied due process of law when he was convicted of first degree murder, sexual battery, grand larceny, and burglary. The Supreme Court of Florida's affirmance of those convictions violated the constitutional standard of Jackson v. Virginia, supra. This Court should grant certiorari in order to correct the Supreme Court of Florida's apparent application of some lesser standard of proof and to prevent that court from misapplying the constitutional standard of proof beyond a reasonable doubt in future cases. This Court should also grant certiorari in order to prevent the grave miscarriage of justice which will occur if the State of Florida is permitted to execute Petitioner for a crime which it has not proven that he committed.

II.

THE DECISION BELOW RAISES THE RECURRING QUESTION OF WHETHER RELIANCE UPON NONSTATUTORY OR IMPROPER AGGRAVATING CIRCUMSTANCES IN SENTENCING A PERSON TO DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AND DEMONSTRATES THAT THE SUPREME COURT OF FLORIDA HAS FAILED TO GUARANTEE CONSISTENT ADMINISTRATION OF THE DEATH PENALTY.

This Court has ruled that imposition of the death penalty under sentencing procedures which create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner violates the Cruel and Unusual Punishment Clause of the Eighth Amendment, made applicable to the states by the Fourteenth Amendment. Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972). Accord, Godfrey v. Georgia, __U.S.__, 64 L.Ed.2d 398,405-406, 100 S.Ct. 1759 (1980). In Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976), this Court found that the capital sentencing procedures provided by Section 921.141, Florida Statutes, facially satisfied the requirements of Furman because the sentencing authority's discretion was guided and channeled by requiring examination of specific aggravating and mitigating factors and because the Supreme Court of Florida's appellate review of death sentences guaranteed that they were consistent with other sentences imposed in similar circumstances. See State v. Dixon, 283 So.2d 1,10 (Fla.1973), cert.denied, sub nom. Hunter v. Florida, 416 U.S. 943, 40 L.Ed.2d 295, 94 S.Ct. 1950 (1974).

In Elledge v. State, 346 So.2d 998,1002-1003 (Fla. 1977), the Supreme Court of Florida ruled that the reversal of a death sentence based in part on nonstatutory or improper aggravating circumstances, where there are also mitigating circumstances present, is necessary in order to satisfy the requirements of Furman and Proffitt. The court followed the Elledge rule in several subsequent cases. E.g., Lewis v.

State, 377 So.2d 640 (Fla.1979); Fleming v. State, 374 So.2d 954 (Fla.1979); Miller v. State, 373 So.2d 882 (Fla.1979); Mikenas v. State, 367 So.2d 606 (Fla.1978); Riley v. State, 366 So.2d 19 (Fla.1978).

The death sentence imposed upon Petitioner in this case is unconstitutional as applied because the sentencing judge's discretion was not restricted to the examination of specific statutory aggravating factors and because the Supreme Court of Florida's affirmance of the death sentence is inconsistent with that court's reversal of the death sentence in Mikenas v. State, 367 So.2d 606 (Fla.1978). In this case, the sentencing judge found five aggravating circumstances. The Supreme Court of Florida found that two of those circumstances, that Petitioner was on probation and that the offense was committed for pecuniary gain, were improperly considered. See pages 10-12 of the opinion below, set forth in Appendix A. Petitioner's probationary status was a nonstatutory aggravating factor. See §921.141(5), Fla.Stat. (1977), set forth in Appendix C. Pecuniary gain was a statutory aggravating factor under Section 921.141(5)(f), but the Supreme Court of Florida found that the evidence was insufficient to support this factor. See page 11 of the opinion below, set forth in Appendix A. Both the sentencing judge and the Supreme Court of Florida rejected Petitioner's age of nineteen as a mitigating factor. See pages 9 and 10 of the opinion below, set forth in Appendix A.

In Mikenas v. State, supra, the sentencing judge found six aggravating circumstances and one mitigating circumstance, the defendant's age of twenty-two. The Supreme Court of Florida reversed the death sentence and remanded for resentencing because one of the aggravating circumstances, that the defendant had a substantial history of prior criminal activity, was improperly found.

The Supreme Court of Florida's affirmance of Petitioner's death sentence cannot be reconciled with the reversal

of the death sentence in Mikenas. Both cases involved the consideration of nonstatutory or otherwise improper aggravating circumstances in addition to other, properly found aggravating circumstances. If Mikenas's age of twenty-two was sufficiently mitigating, despite his substantial history of prior criminal activity, to require resentencing, surely Petitioner's age of nineteen was also sufficiently mitigating, despite his prior history, to require resentencing. The fact that the sentencing judge found Mikenas's age to be mitigating while the sentencing judge in this case did not find Petitioner's age to be mitigating is of no consequence. It is the Supreme Court of Florida's responsibility to insure that sentencing judges reach similar results under similar circumstances. Proffitt v. Florida, supra, at 428 U.S. 250-253, 49 L.Ed.2d 922-932, State v. Dixon, supra, at 283 So.2d 10.

The Supreme Court of Florida's affirmance of Appellant's death sentence conflicts in principle with the decision of the United States District Court in Henry v. Wainwright, __F.Supp.__ (M.D. Fla.Case No. 79-584, opinion filed February 14, 1980)(unreported opinion set out in Appendix D). Henry petitioned for federal habeas corpus relief from a death sentence imposed by a Florida trial court. The district court held that Henry was entitled to a new sentencing hearing because the trial court improperly instructed the jury that the aggravating factors which they could consider in rendering their advisory sentencing verdict were not limited to those factors specified in Section 921.141(5), Florida Statutes. The district court found a due process and equal protection violation which was not rendered harmless by the absence of any mitigating circumstances.

Moreover, the question of whether reliance upon nonstatutory aggravating circumstances in sentencing a person to death violates the Eighth and Fourteenth Amendments is not unique to Florida. It is a question which will arise in

virtually every state which authorizes the death penalty. In those states where the problem of reliance on nonstatutory or improper aggravating circumstances has been considered, the courts have divided on the resolution of the issue. Alabama and North Carolina courts have required a new sentencing hearing where the sentencing authority relied in part upon nonstatutory or improper aggravating circumstances, although neither court addressed the question of whether such reliance would violate the Eighth and Fourteenth Amendments. Bufford v. State, 383 So.2d 1162,1173-1175 (Ala.Crim. App. 1980), cert.denied, 382 So.2d 1175 (Ala.1980); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551,567-568 (1979). Arizona, Georgia, and Nebraska courts have affirmed death sentences where the sentencing authority relied in part on nonstatutory or improper aggravating circumstances, again without addressing the constitutional issue. State v. Steelman, 612 P.2d 475, 481-483 (Ariz.1980); Gates v. State, 244 Ga. 587, 261 S.E.2d 349,357-358 (1979); State v. Peery, 199 Neb. 656, 261 N.W.2d 95,104-106 (1977), cert.denied, 439 U.S. 882, 58 L.Ed.2d 194, 99 S.Ct. 220 (1978). The Supreme Court of Louisiana has affirmed a death sentence upon finding that one of three aggravating circumstances relied upon by the jury was proper, despite a strong dissent arguing that a new sentencing hearing was constitutionally mandated because two of the aggravating circumstances relied upon were not supported by the record. State v. Williams, 383 So.2d 369 (La.1980). The Supreme Court of Utah has expressly approved of reliance upon a nonstatutory aggravating factor in support of a death sentence without discussing the constitutional issue. State v. Codianna, 573 P.2d 343,352-353 (Utah 1977), cert.denied, 439 U.S. 882, 58 L.Ed.2d 194, 99 S.Ct. 219 (1978).

The consequence of allowing sentencing courts to rely upon nonstatutory and improper aggravating factors in sentencing persons to death is that the principles of Furman

v. Georgia and Proffitt v. Florida, supra, are being severly eroded in the state courts. Justice England of the Florida Supreme Court virtually admitted this in his concurring opinion in Witt v. State, 387 So.2d 922 (Fla.1980), cert.denied, __U.S.__, 66 L.Ed.2d 612, 101 S.Ct.__ (1980). In Witt, the Supreme Court of Florida affirmed the denial of Witt's motion to vacate his death sentence despite the trial court's reliance upon nonstatutory aggravating circumstances in imposing the sentence. Justice England opined,

> The consequence of our decision today, of course, is that, unless the United States Supreme Court determines otherwise, individuals in Florida may well be executed for crimes similar to those committed by others who have been spared the death penalty. Disparities in sentencing will occur--despite all the rhetoric about death being different and the courts exercising special scrutiny to prevent arbitrariness--simply to preserve overriding societal needs.

Id., at 387 So.2d 932.

This Court should grant certiorari in order to reaffirm the principles of Furman v. Georgia and Proffitt v. Florida, supra, and require consistency in the administration of death penalty statutes. In order to resolve the conflict of authority developing among state and federal courts, this Court should grant certiorari to decide whether reliance upon nonstatutory and improper aggravating circumstances in sentencing a person to death violates the Eighth and Fourteenth Amendments and requires resentencing.

CONCLUSION

For these reasons, Petitioner respectfully requests this Honorable Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Florida.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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APPENDIX

Appendix A	Opinion of the Supreme Court of Florida in Peek v. State, __ So.2d __ (Fla. Case No. 54,226, opinion filed Oct. 30, 1980), and order denying rehearing on January 27, 1981.
Appendix B	Eighth and Fourteenth Amendments, Constitution of the United States.
Appendix C	Section 921.141, Florida Statutes (1977).
Appendix D	Opinion of the United States District Court in Henry v. Wainwright, __ F.Supp. __ (M.D.Fla.Case No. 79-584, opinion filed Feb. 14, 1980).

Supreme Court of Florida

CORRECTED COPY

No. 54,226

ANTHONY RAY PEEK, Appellant,

vs.

STATE OF FLORIDA, Appellee.

Received By
JAN 29 1981
Appellate Division
Public Defenders Office

[October 30, 1980]

PER CURIAM

Appellant Anthony Ray Peek was convicted of first degree murder, sexual battery, grand larceny and burglary. The jury recommended and the trial judge imposed a sentence of death on the murder charge. Jurisdiction vests in this Court pursuant to article V, section 3(b)(1), Florida Constitution. We affirm the conviction and sentence.

Erna L. Carlson returned to her home in Winter Haven, Florida, following a visit with relatives at approximately 9:00 p.m. on May 21, 1977. At 8:30 a.m. the following morning, Mrs. Carlson's body was discovered in her bedroom with her robe and part of a bedspread tied tightly around her neck. The screens on the door to the porch and on the door leading from the porch to the house had been cut, and a piece of stocking containing a strand of negroid hair was found in the garage. The victim's pajama bottoms contained blood and seminal fluid stains. No fingerprints were found in the house.

On May 22, 1977, police located Mrs. Carlson's automobile at a lakeside park approximately one mile from her home. The door to the driver's side was locked, the passenger door was not.

The keys to the automobile were in the glove compartment. Fingerprints were found on the inside of the driver's side window.

Prompted by allegations that Peek had been going door to door seeking employment in the Winter Haven area, Officer Donnelly of the Winter Haven Police Department interviewed him several days after the murder. Appellant lived in a supervised halfway house at the time of the crime. He told Donnelly that he had returned to the halfway house before 11:00 p.m. on the night of May 21, 1977, and had not been in the vicinity of Mrs. Carlson's home or of the lakeside park. Appellant voluntarily permitted the taking of his fingerprints and the extraction of hair samples. The hair samples were sent to the Sanford Crime Lab for comparison but were lost subsequent to the testing.

Appellant was tried in the Circuit Court for Polk County on April 10, 1978. Dr. Luther Youngs testified that Mrs. Carlson died of strangulation. She also had been raped and had suffered two fractured ribs. An employee from the Sanford Crime Lab testified that the hair samples obtained from appellant were consistent in microscopic appearance to the hair found in the stocking at the scene of the crime. Although it is never possible to say that two hairs are identical, the hairs of only approximately two out of every 10,000 persons exhibit consistent microscopic characteristics. The blood and seminal fluid stains taken from Mrs. Carlson's pajamas were from an individual with type O secretor blood; appellant is a type O secretor. The evidence further revealed that the fingerprints found inside Mrs. Carlson's car matched those of appellant.

Appellant took the stand and, with one significant exception, reiterated the account first given to Officer Donnelly. He contradicted, however, his prior assertion that he was not in the area where the victim's car was found on May 22, 1977. Appellant testified instead that on that morning he rode his bicycle to the lakeside park. Noticing a car parked nearby with

the door unlocked, he opened the door and searched the glove compartment, after which he rode his bicycle back to the halfway house.

The jury found appellant guilty of all four offenses and returned a recommended sentence of death on the murder charge. Prior to sentencing, defense counsel's motion for appointment of experts to examine appellant as a mentally disordered sex offender was denied. On May 2, 1978, the court adjudged appellant guilty and sentenced him to death for first-degree murder. The court also imposed a life sentence for the sexual battery and a term of five years each for grand larceny and burglary, to run consecutively.

I

Appellant challenges his conviction on essentially three grounds. He first asserts that the prosecution failed to establish an adequate chain of custody of his hair samples. The evidence at trial revealed that on July 7, 1977, Officer Latner received four hair samples from appellant which he sealed in four separate plastic bags. The samples were transferred to the Sanford Crime Lab. Diana Bass, a microanalyst at the Sanford Lab, testified that in December of 1977 she received several sealed plastic bags containing negroid hair. The transmittal sheet accompanying the bags noted that the samples were from Anthony Ray Peek. The bags did not appear to have been "opened, tampered with, or in any way adulterated."

Relevant physical evidence is admissible unless there is an indication of probable tampering. Frederiksen v. State, 312 So.2d 217 (Fla. 3d DCA 1975); Stunson v. State, 228 So.2d 294 (Fla. 3d DCA 1969). Accord, United States v. Daughtry, 502 F.2d 1019 (5th Cir. 1974). The record here reflects no hint of tampering, thus the trial judge did not abuse his discretion in permitting the introduction of the hair comparison analysis.

Appellant's assertion that he was denied due process by introduction of the hair samples because their subsequent loss

prevented an independent inspection is similarly unavailing. While there is support for the proposition that a criminal defendant must have an opportunity to inspect physical evidence which is to be used against him, Brady v. Maryland, 373 U.S. 83 1963); Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975); Johnson v. State, 249 So.2d 470 (Fla. 3d DCA 1971), cert. discharged 280 So.2d 673 (Fla. 1973), such a right, like most others, may be waived. In this case appellant made demand for discovery of reports and results of scientific tests and experiments, to which the state responded with a list of the hair samples and lab reports. Appellant did not, however, move the trial court to inspect or test the hair specimens. He cannot now claim entitlement to a right which in the first instance he chose to forego.

Appellant next contends that the evidence failed to establish his guilt beyond a reasonable doubt. He properly cites McArthur v. State, 351 So.2d 972 (Fla. 1977), prohibition denied sub nom. McArthur v. Nourse, 358 So.2d 132 (Fla. 1978), vacated and remanded on other grounds sub nom. McArthur v. Nourse, 438 U.S. 902 (1978), for the proposition that circumstantial evidence will not sustain a conviction unless it is inconsistent with any reasonable hypothesis of innocence. Accord, Davis v. State, 90 So.2d 629 (Fla. 1956). In applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false. Mayo v. State, 71 So.2d 899 (Fla. 1954); Holton v. State, 87 Fla. 65, 99 So. 244 (1924).

The case against appellant is concededly circumstantial. But we are satisfied that, when considered in combination, the evidence relating to the matching fingerprints, the hair comparison, and the blood and semen analysis enabled the jury to reasonably conclude that appellant's guilt was proven beyond a reasonable doubt. Moreover, appellant's only reasonable hypothesis of innocence, that he entered the victim's car at the lakeside park the morning following the murder, was

effectively discredited by Officer Donnelly's account on rebuttal of appellant's original assertion that he had never been in the vicinity of the park. In view of this prior inconsistent statement, the jury was justified in disbelieving appellant's version of events.

We have considered the remaining issues related to appellant's conviction, but find them to be without merit.

II

Turning to the sentencing phase of the trial, we must first consider whether the trial court abused its discretion in denying defense counsel's motion for appointment of experts to examine appellant as a mentally disordered sex offender. Section 917.14, Florida Statutes (1977), provides:

> 917.14 Certifying defendant for hearing.
> (1) If a defendant has been convicted of or has pleaded guilty or no contest to an offense or attempted offense in a current prosecution, the court may defer sentencing and certify him for a hearing and examination in the circuit court to determine whether he is a mentally disordered sex offender.
> (2) The court may certify a defendant under subsection (1) on its own motion, on motion by the State Attorney or the defendant, or on application by affidavit of the defendant.

By the act's express terms, certification under section 917.14 is discretionary. Failure to certify will not be error unless the record reveals a clear abuse of judicial discretion. LeDuc v. State, 365 So.2d 149 (Fla. 1978); Huckaby v. State, 343 So.2d 29 (Fla. 1977). No such error has been demonstrated in this case.

In its charge to the sentencing jury on the proper consideration of aggravating and mitigating circumstances, the trial court instructed that "[t]he aggravating circumstances which may be considered, are limited to such of the following as may be established by the evidence . . ." and "[t]he mitigating circumstances, which you may consider if established by the evidence, are these . . ." (emphasis supplied). Appellant maintains that this charge unconstitutionally limited jury consideration of mitigating factors to those statutorily enumerated. We do not agree.

Perhaps the clearest and most constant principle emanating from the sometimes obscure light of Furman v. Georgia, 408 U.S. 238 (1972), and its progeny is that unbridled discretion in sentencing capital defendants begets arbitrary and discriminatory application of the death penalty. We are told that at least three justices in Furman believed the death penalty unconstitutional because:

> discretionary sentencing, unguided by legislatively defined standards, violated the Eighth Amendment because it was "pregnant with discrimination," id., at 257 (Douglas, J., concurring), because it permitted the death penalty to be "wantonly" and "freakishly" imposed, id., at 310 (Stewart, J., concurring), and because it imposed the death penalty with "great infrequency" and afforded "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not," id., at 313 (White, J., concurring).

Lockett v. Ohio, 438 U.S. 586, 599 (1978). It appears incontestable, then, that to a large extent "the sentencing authority's discretion [must be] guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, 428 U.S. 242, 258 (1976).

Recurring to the charge given in this case, we note at the outset that it in no way restricts the jury to a consideration of the statutorily enumerated mitigating circumstances. Indeed, the instruction on mitigating circumstances, when read in conjunction with the express limitation on consideration of aggravating circumstances, advises the jury that the list of statutory mitigating factors is not exhaustive. See Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (on rehearing). It strikes a constitutional balance by directing, but not limiting, scrutiny to those areas of mitigation considered vital by the legislature in determining the fairness of a life or death sentence, thereby assuring that the death penalty will be applied in a consistent and rational manner.[1] Were we to sanction an instruction which

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[1] "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." Gregg v. Georgia, 428 U.S. 153, 193 (1976).

established no effective guidance for the jury in considering circumstances which may mitigate against death, we would surely breathe life into Mr. Justice Rehnquist's admonition that such a procedure would "not guide sentencing discretion but [would] totally unleash it." Lockett v. Ohio, 438 U.S. at 631 (Rehnquist, J., concurring in part and dissenting in part).

Contrary to appellant's assertion, the instruction given here is consistent with Lockett v. Ohio. Lockett holds only that a sentencing body must not be precluded from considering, as a mitigating factor, aspects of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. As noted above, our death penalty statute does not limit consideration of mitigating circumstances to those statutorily enumerated.[2] Moreover, unlike the Ohio statute invalidated in Lockett, the mitigating circumstances in Florida's statute direct the jury's attention to many aspects of the defendant's character and the circumstances surrounding the offense.[3] While we do not contend that the statutory mitigating circumstances encompass every element of a defendant's character or culpability, we do maintain that the factors, when coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his or her entitlement to a sentence less than death.

The trial judge made these findings of fact in support of the death sentence:

> As to Count One of the Indictment, wherein the Defendant was convicted of First Degree Murder, the Court makes the following findings of fact:
>
> 1. As an aggravated circumstance under Florida Statute 921.141(5)
>
> (a) The capital felony of Murder in the First Degree was committed by Anthony Ray Peek while he was on probation on two charges

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[2] Section 921.141(1), Florida Statutes (1977), provides that during the sentencing proceeding, "evidence may be presented as to any matter that the court deems relevant to sentence . . . ."

[3] See, e.g., § 921.141(6)(a), (6)(d), (6)(g), Fla. Stat. (1977).

of Burglary, one count of Grand Larceny and two charges of Petit Larceny, having been placed on said probation on November 15, 1976, for a period of five (5) years. Copy of the Order of Probation in Case No. CF76-1842 is attached hereto and marked "Exhibit A".

(b) The defendant was previously convicted in Polk County, Florida, on December 15, 1977, of three charges, to-wit: Burglary, Sexual Battery and Robbery, and was on the 4th day of April, 1978, sentenced to life imprisonment on the Sexual Battery charge and fifteen (15) years on each of the Burglary and Robbery charges to run consecutively with the life sentence. A copy of the Judgment and Sentence in this case is attached and marked "Exhibit B"; that the conviction for the felonies contained in the Information in Case No. CF77-1658 involved the use or threat of violence to the victim.

(c) The Court finds that the facts of this case do not support the aggravated circumstances in Florida Statutes 921.141 (5)(c) in that the Defendant did not knowingly create a great risk of death to many persons, other than the victim.

(d) The capital felony, the murder of Erna L. Carlson, was committed while the Defendant was actively engaged in the commission of the sexual battery of Erna L. Carlson.

(e) This Court finds that the facts of this case do not support the aggravated circumstances in Florida Statutes 921.141(5)(e) in that this capital felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) This Court finds that the crime was committed by Anthony Ray Peek for pecuniary gain by ransacking the victim's purse, obtaining the keys to a motor vehicle, the property of Erna L. Carlson, and then stealing said motor vehicle.

(g) This Court finds that the facts of this case do not support the aggravated circumstances in Florida Statutes 921.141(5)(g) in that the capital offense was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) This Court finds that this capital offense was especially heinous, atrocious and cruel in that evidence at the trial shows that the sixty-five year old victim, Erna L. Carlson, received extensive blows to her head and body, broken ribs, a crushed larnyx, and was strangled by the use of clothing and bedclothes wound around her neck and tied to the headboard of a bed. According to expert medical opinion, the victim suffered tremendous excruciating pain while being raped and killed.

2. As to mitigating circumstances in Florida Statutes 921.141(6)

(a) The Court finds that the Defendant, ANTHONY RAY PEEK, did have a history of prior criminal activity and, therefore, rejects Florida Statutes 921.141(6)(a) as a mitigating circumstance.

(b) The Court finds that this capital offense was not committed while the Defendant was under extreme mental or emotional disturbance and, therefore, rejects Florida Statutes 921.141(6)(b) as a mitigating circumstance.

(c) The victim, Erna L. Carlson, was not a participant in the Defendant's acts of Burglary, Grand Larceny, Sexual Battery and Murder in the First Degree, and this Court expressly rejects this subsection, Florida Statutes 921.141(6)(c) as a mitigating circumstance.

(d) The Defendant acted alone in the commission of these offenses and the Court expressly rejects subsection 921.141(6)(d), Florida Statutes, as a mitigating circumstance.

(e) The Defendant, ANTHONY RAY PEEK, did not act under extreme duress or under the domination of any other person and the Court expressly rejects subsection 921.141(6)(e) as a mitigating circumstance.

(f) The Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired, and the Court expressly rejects subsection 921.141(6)(f), Florida Statutes, as a mitigating circumstance.

(g) Finally, the age of the Defendant, ANTHONY RAY PEEK, has been considered as required by subsection 921.141(6)(g) of the Florida Statutes. The Defendant was twenty (20) years old at the time of the offense and his age is rejected as a mitigating circumstance.[4]

In conclusion, the Court finds that there are sufficient aggravating circumstances to justify the imposition of the death penalty. There are no mitigating circumstances. The evidence clearly demonstrates that Erna L. Carlson was the victim of a cold, cruel and heartless killer.

Appellant argues that his age at the time of the commission of the crime should have been considered a mitigating factor.[5] There is no per se rule which pinpoints a particular age as an automatic

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[4] The judge subsequently corrected this finding to show that appellant was nineteen at the time of the crime, although his conclusion that Peek's age was not a mitigating circumstance did not change.

[5] § 921.141(6)(g), Fla. Stat. (1977).

factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing. Compare Hoy v. State, 353 So. 2d 826 (Fla. 1977), with Songer v. State, 322 So. 2d 481 (Fla. 1975). The trial judge expressly considered but rejected appellant's age as a mitigating factor. The record supports his finding.

Appellant contends it was error to regard appellant's probationary status as being within the aggravating circumstance set forth in section 921.141(5)(a), Florida Statutes (1977), which allows consideration as an aggravating circumstance the fact that the capital felony was "committed by a person under sentence of imprisonment." The appellant asserts that a grant of probation is not a sentence of imprisonment because a probationer is not in prison confinement. Under the facts of this case, we agree an individual on probation and not incarcerated is not under a sentence of imprisonment.

Probation is a sentence alternative but is not generally considered to be a sentence of imprisonment. An exception arises, however, if the order of probation includes as a condition a term of incarceration and the capital felony is committed while the defendant is or should be incarcerated. We find that the phrase "person under sentence of imprisonment" includes (a) persons incarcerated under a sentence for a specific or indeterminate term of years, (b) persons incarcerated under an order of probation, (c) persons under either (a) or (b) who have escaped from incarceration, and (d) persons who are under sentence for a specific or indeterminate term of years and who have been placed on parole. Persons who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase "person under sentence of imprisonment" as set forth in section 921.141(5)(a). Consequently, this aggravating circumstance was improperly found in the instant case.

The trial court further found as an aggravating circumstance that appellant had been convicted of felonies "involving the use or threat of violence to the person."

§ 921.141(5)(b), Fla. Stat. (1977). Appellant urges that since these prior convictions were on appeal at the time of sentencing, they cannot be considered "convictions" for purposes of section 921.141(5)(b). We disagree. Appellant had previously been convicted of burglary, sexual battery, and robbery. They were on appeal at the time of sentence and were subsequently affirmed. Peek v. State, 374 So. 2d 106 (Fla. 2d DCA 1979). These were in fact convictions at the time of sentencing. Because these convictions were affirmed, their consideration by the trial judge in the instant case was proper. We do not have the problem which would arise from the consideration as an aggravating circumstance of a conviction valid at the time of sentencing, that is subsequently reversed and vacated by an appellate court.

The appellant next contends the trial court was also in error in finding that the capital felony was committed for pecuniary gain. § 921.141(5)(f), Fla. Stat. (1977). Although it appears that appellant ransacked Mrs. Carlson's purse and made off with her automobile, there is no evidence that any money or household belongings were taken. The record does not support the conclusion that Mrs. Carlson was murdered to facilitate the theft, or that appellant had any intention of profiting from his illicit acquisition. The more reasonable inference is that appellant stole the car in order to quicken his escape from the scene of the murder. Considering all the circumstances, the evidence linking the murder to a motive for pecuniary gain is insufficient to establish this aggravating factor beyond a reasonable doubt.

The trial court's findings with respect to the two remaining aggravating circumstances are fully justified by the record. It is unrefuted that the capital felony was committed during the commission of a sexual battery. § 921.141(5)(d), Fla. Stat. (1977). Further, the medical testimony clearly establishes that Mrs. Carlson's horrible suffering at the hands of her attacker was "especially heinous, atrocious, or cruel." § 921.141(5)(h), Fla. Stat. (1977). Thus, we have two clearly valid aggravating circumstances, one contested but valid aggravating circumstance, and no mitigating circumstances. We

find that the trial court's improper consideration of the two aggravating circumstances concerning pecuniary gain and commission of the offense while on probation does not render the sentence invalid. Hargrave v. State, 366 So. 2d 1 (Fla. 1978); Elledge v. State, 346 So. 2d 998 (Fla. 1977). Upon an independent review, we find the evidence and record clearly justify the imposition of the death sentence.

Accordingly, the judgments of guilt and sentence of death are affirmed.

It is so ordered.

ADKINS, BOYD, OVERTON and ALDERMAN, JJ., and VANN, Associate Justice, Concur
SUNDBERG, C.J., Dissents with an opinion
ENGLAND, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

SUNDBERG, C. J., dissenting.

I respectfully dissent from the majority's affirmance of appellant's conviction. While I am not unmindful of the atrocities committed upon the victim in this case and the principle of law that even in a capital case a conviction may be based wholly upon circumstantial evidence, nevertheless, pursuant to the obligation imposed upon me by section 921.141(4), Florida Statutes (1977), and Florida Rule of Appellate Procedure 9.140(f), I have reviewed the evidence in this cause and determine that the interest of justice requires a reversal. In my mind the evidence is insufficient to prove beyond a reasonable doubt that appellant was the perpetrator of this heinous crime. The hair, blood and semen analysis coupled with the fingerprints found in the victim's automobile are simply insufficient to support the conviction, in view of the statistical probability of the occurrence of like-type hair, blood and semen in the population and the inability of the state to establish that the fingerprints were placed in the automobile at the time the crime was committed. State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976); Williams v. State, 308 So.2d 595 (Fla. 1st DCA 1975), cert. denied 321 So.2d 555 (Fla. 1975); Wilkerson v. State, 232 So.2d 217 (Fla. 2d DCA 1970). Appellant explained the presence of his fingerprints in the automobile and that they were placed there the morning after the crime. This testimony was discredited by testimony of Officer Donnelly to the effect that appellant had made a previously inconsistent statement. However, Officer Donnelly's testimony did not serve to place appellant's fingerprints in the automobile at the time the crime was committed or at a time shortly thereafter. His testimony was nothing more than impeachment.

Accordingly, based on the evidence in this record, I feel compelled to reverse the judgment of conviction.

Furthermore, I dissent from several conclusions reached by the majority with respect to application of section 921.141(5)(a), Florida Statutes (1977). First, I reject the majority's conclusion that section 921.141(5)(a) permits

consideration of a defendant's probation status at the time of commission of a homicide. That section provides that it is an aggravating circumstance if the capital felony was "committed by a person under sentence of imprisonment." (Emphasis supplied.) A grant of probation is not a sentence of imprisonment whether incarceration is a condition of probation or not. The legislature has repeatedly and consistently distinguished between a sentence of imprisonment and probation. Compare chapter 948, Florida Statutes (1979) (probation) with chapter 947, section 947.16, Florida Statutes (1979) (sentence). It cannot be presumed that the legislature was unmindful of this distinction when it enacted section 921.141(5)(a). It may be that a person's actual state of incarceration or escape therefrom at the time of commission of a capital felony is just as valid a consideration for imposition of the death penalty whether that incarceration is by virtue of a sentence or as a condition of probation. Nevertheless, that is a legislative decision, and I would not presume to impute an intent to that body which is so contrary to its consistent delineation between sentence and probation.

Second, I cannot accept the proposition that a nonfinal conviction of a violent felony may be considered as an aggravating circumstance under section 921.141(5)(b), Florida Statutes (1977). This question has not previously been addressed directly by the Court. But see McCrae v. State, No. 45,894 (Fla. Oct. 30, 1980) (plea of guilty, as opposed to a nonfinal conviction, to a violent felony without adjudication of guilt an aggravating circumstance under section 921.141(5)(b)). For aid in determining what constitutes a "conviction" under this section, I would utilize the interpretation of that term under section 775.084, Florida Statutes (1975), our habitual offender statute, because the purposes of both that statute and section 921.141(5)(b) are similar--to enhance punishment due to prior criminal convictions. Under section 775.084, a prior conviction is not final until appellate review has concluded. Joyner v. State, 158 Fla. 806, 30 So.2d 304 (1947); Garrett v. State, 335 So.2d 876 (Fla. 4th DCA 1976); Coleman v. State, 281 So.2d 226

(Fla. 2d DCA 1973). In view of the similarity in underlying philosophy between the two statutes, and in view of the awesome finality of the death penalty, I would hold that for purposes of section 921.141(5)(b) a prior conviction may not be utilized in aggravation until direct appellate review has concluded. I am unpersuaded by the majority's reliance on the fact that the convictions in this case were affirmed pending this appeal. What if they remained unresolved on the date of this opinion? It occurs to me that the wisdom upon which section 775.084 is bottomed should not be lightly regarded. Because of the unique attributes of the death penalty, we have engaged in a narrow construction of chapter 921 when a question as to its meaning has arisen. See Elledge v. State, 346 So.2d 998 (Fla. 1977) (section 921.141(5), Florida Statutes (1975), construed to permit only consideration of enumerated factors as aggravating circumstances). Adherence to this rule of construction indicates to me that finality of conviction for purposes of section 921.141(5)(b) should be at least as stringent as for section 775.084, where the consequences are not nearly so grave.

ENGLAND, J., Concurs in so much of this dissent as would reverse appellant's conviction.

An Appeal from the Circuit Court in and for Polk County,

Gordon MacCalla, Acting Circuit Judge - Case Nos. CF78-445 & CF77-2567

Jack O. Johnson, Public Defender, and Paul C. Helm, Assistant Public Defender, Bartow, Florida,

for Appellant

Jim Smith, Attorney General, and Charles Corces, Jr., Assistant Attorney General, Tampa, Florida,

for Appellee

Received By

JAN 29 1981

Appellate Division
Public Defenders Office

Supreme Court of Florida

TUESDAY, JANUARY 27, 1981

ANTHONY RAY PEEK, **

Appellant, **

**

vs. ** CASE NO. 54,226

**

STATE OF FLORIDA, **

Appellee. **

**

The Motion for Rehearing is hereby denied. The Motion for Clarification is granted and the final paragraph of the Court's opinion filed October 30, 1980, is corrected to read as follows:

> Accordingly, the judgments of guilt and sentence of death are affirmed.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ. and VANN, Associate Justice, Concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

JB

cc: Paul C. Helm, Esquire
Charles Corces, Jr., Esquire
Hon. Gordon MacCalla, Judge
E. D. "Bud" Dixon, Clerk

Received By
JAN 29 1981
Appellate Division
Public Defenders Office

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy of the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES DUPREE HENRY,

Petitioner,

vs.

No. 79-584-Orl-Civ-R

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections,

Respondent.

FILED
ORLANDO, FLA.
FEB 14 1980
WESLEY R. THIES
CLERK

MEMORANDUM OF DECISION

Summary of Decision: In connection with the petition by James Dupree Henry for the issuance of a writ of habeas corpus, this court has conducted an evidentiary hearing and reviewed the entire trial transcript and the briefs of the parties. Based thereon, the court finds that no error was committed by the trial court of such a nature as to invalidate the conviction. The court did find, however, that the trial court committed an error in instructing the jury at the sentencing hearing. The erroneous instruction effectively denied the Petitioner the right to a sentencing hearing conducted in compliance with the applicable statutes of the State of Florida. The error, therefore, denied the Petitioner due process and equal protection of the law of the State of Florida. Hence, it is the conclusion of this court that the State should afford the Petitioner another sentencing hearing at which the jury will be correctly instructed as to the matters upon which it may

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Appendix D

base its sentencing recommendation. This court will issue the writ of habeas corpus only if such hearing is not afforded the Petitioner within ninety days from the date hereof.

Introduction: On 26 June 1974, the Petitioner was convicted by a jury of first degree murder in the Circuit Court for Orange County, Florida. The trial court sentenced the Petitioner to death by electrocution. The Petitioner appealed the conviction to the Supreme Court of Florida which affirmed the judgment, Henry v. State, Fla. 1975, 328 So.2d 430. A petition for certiorari to the United States Supreme Court was denied, 1976, 429 U.S. 951; reh. denied, 1977, 429 U.S. 1124. On 31 October 1979, Petitioner filed a motion to vacate the judgment pursuant to Florida Rule of Criminal Procedure 3.850 in the Circuit Court for Orange County, Florida. The trial court denied the motion on 19 November 1979, and its denial was affirmed by the Florida Supreme Court on 27 November 1979. Henry v. State, 1979, ____ So.2d ____.

The petition for a writ of habeas corpus was filed in this court on 27 November 1979. The record before this court consists of:

(1) The transcript of the testimony before the Orange County Circuit Court at the

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time of trial, reference to which will be designated as "Tr.";

(2) The transcript of the testimony before the Circuit Court of Orange County, Florida, taken in a pre-trial hearing on Petitioner's motion to suppress, reference to which will be designated "S. Tr.";

(3) The transcript of the record before the state trial court, reference to which will be designated "Transcript of Record";

(4) Petitioner's brief before the Florida Supreme Court on his original direct appeal and the State's brief on Petitioner's appeal from the denial of the Rule 3.850 motion;

(5) The evidence presented before this court on 11 January 1980.

The grounds on which the Petitioner relies for relief will be discussed in the order in which they appear in the petition filed herein.

Point 1

The Petitioner's first ground for relief is that his post-arrest confession which was admitted in evidence (Tr. p. 244) was involuntary and should have been suppressed by the trial judge.

No evidence was introduced at the evidentiary hearing before this court to support this ground. The following is the evidence that was before the state trial judge in connection with the motion to suppress the confession.

John Matthews, the arresting officer, testified that he arrested the Petitioner on the 28th of March 1974

at approximately 12:10 P.M. He brought Petitioner to the Orlando Police Station for "booking" at about 12:15 P.M. At the booking office the Petitioner was advised of his Miranda rights (S. Tr. p. 8) and acknowledged he understood them (S. Tr. p. 10). After having been read his rights, Petitioner signed the back of a Miranda card indicating that he understood his rights (S. Tr. p. 10). Officer Matthews testified that he offered no inducements to obtain the signature of the Petitioner on the Miranda card.

The Petitioner gave somewhat contradictory testimony. At first he testified (S. Tr. p. 94) that he was advised by Officer Matthews that he had a right to remain silent. He then testified that Officer Matthews did not verbally advise him of his rights, but that he put a Miranda card in front of him and that he, the Petitioner, did not read it because he thought that the card stated that he had the privilege of having a lawyer and did not need to say anything he did not wish to say (S. Tr. p. 95).

After the "booking" procedure, according to the testimony of Officers Charles R. Ings and R. D. King of the Orlando Police Department, the Petitioner was taken to a conference room at the Orlando Police Department.

Before the questioning commenced, King advised the Petitioner that he was charged with the first degree murder of Z. L. Riley and the shooting of a police officer (Tr. p. 23 and S. Tr. pp.22-23) and Ings advised the Petitioner a second time of his Miranda rights by reading to

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him a yellow Miranda card (S. Tr. p. 17). After reading the card to him, Ings asked the Petitioner to sign it. Following the signing of the Miranda card, King and Ings, according to Ings' testimony, questioned the Petitioner about his involvement in the robbery and murder of Z. L. Riley. At first Petitioner refused to admit any involvement. He then admitted that he had been in Riley's house and at about 4:00 P.M. he gave the incriminating statement which was tape recorded, transcribed, and signed by Petitioner. During the course of the interview which preceded the giving of the taped statement, Officer Ings advised the Petitioner that if he cooperated, his cooperation would be made known to the State Attorney's office (S. Tr. p. 19).

According to Ings, as the discussion progressed the Petitioner stated that he wished the officers to have a prayer with him. At this point Investigator King said a prayer with the Petitioner and immediately thereafter Petitioner confessed to the offense.

Henry testified that the prayer session had no influence on his willingness to make a confession. He testified:

. . .

"A. Well, I was crying, and it wasn't the part of the prayer, it was the part of them going through all of this and if I still said, no, then I felt like they would do something to me.

Q. Do you feel that the prayer session and the discussion about religion

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influenced the fact that you did make a statement to them?

A. Well, I would say not just a prayer, but the way they did it . . . you know . . . they kind of forced me to make a confession."

(S. Tr. pp. 86-87).

Additionally, Henry testified that Officer King ". . . was squeezing on my shoulder . . . you know . . . I mean, to me . . . I mean . . . in my mind I felt like if they were going to all this trouble of trying to make me say something and I refused, that they might do something to me . . . you know . . . so, this is why I went on and said that I would make the Confession. . . ."

From Petitioner's testimony, it appears without contradiction that at the time of the interview between him and Officers Ings and King, Henry was twenty-four years of age and had recently been released from the Florida State Penitentiary at Raiford following a conviction based on a plea of guilty. He was able to read and had been through the tenth grade (S. Tr. pp. 77, 94).

Petitioner testified in the trial court on the motion to suppress that during the course of his interview with King and Ings, Ings said it would be easier on him to tell what happened, and when King asked if Henry would like to make a statement, Henry replied that he would like to see a lawyer to which the officers made no verbal response.

According to Officer Ings, Petitioner never

indicated to him that he desired to speak to an attorney or mentioned the name of an attorney. The testimony of Investigator King basically coincides with that of Officer Ings, except that when asked whether or not Petitioner requested an attorney, Officer King responded, "I don't remember anything, no sir". (S. Tr. pp.55, 56).

After hearing the testimony and observing the witnesses, the trial judge denied the motion to suppress (S. Tr. p. 107). In so doing the trial judge was acting within the realm of reason in disbelieving the testimony of Petitioner to the effect that he requested representation by an attorney. No testimony was presented to this court that would justify a different conclusion. The trial court's credibility choice is supported by the Petitioner's interest and by the fact that Petitioner was aware by virtue of two warnings that he had the right to remain silent, the right to an attorney, and the right to halt the interrogation.

The fact that Officer Ings told the Petitioner that his cooperation would be made known to the State Attorney was not such an inducement as to render the confession involuntary as a matter of law (see United States v. Curtis, CA9, 1977, 562 F.2d 1153, and United States v. Barfield, CA5, 1975, 507 F.2d 53, cert. denied 421 U.S. 950) and, as a matter of fact, there was ample evidence before the trial court from which it could have found by a preponderance of the evidence that the confession was

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the voluntary act of the Petitioner. Such a finding could have been based on the age of the Petitioner, his prior prison experience, the adequacy of the warnings given, the fact that he had been familiar with one of the interrogating police officers from childhood, and the absence of any physical abuse, actual or threatened, during the interview. The finding of voluntariness which is implicit in the trial judge's denial of the motion to suppress is entitled to a presumption of correctness in this proceeding. See Blasingame v. Estelle, CA5, 1979, ____ F.2d ____, and 28 U.S.C. § 2254(d). The burden here rests on the Petitioner to establish that the trial judge's determination was erroneous, and he has failed to carry this burden with respect to the voluntariness of the confession. Webster v. Estelle, CA5, 1974, 505 F.2d 926; cert. denied 421 U.S. 918.

The Petitioner also argues that the trial judge denied him due process of law by failing to make written findings of fact and conclusions of law in connection with the ruling on the motion to suppress. In support of this argument, Petitioner cites Jackson v. Denno, 1964, 378 U.S. 368, and Sims v. Georgia, 1967, 385 U.S. 538. Neither of these cases stands for the proposition that a state trial judge must make formal findings of fact or conclusions of law when ruling on a motion to suppress. In fact, Sims v. Georgia is exactly to the contrary. The two opinions taken together simply require that before a confession is introduced into evidence, the trial court determine its voluntariness and that the conclusion of the trial judge appear

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from the record with unmistakable clarity.

The Petitioner's first ground for relief is, therefore, without merit.

Point 2

The second ground on which the Petitioner relies for relief is that the imposition of the death penalty would be cruel and unusual in violation of the Eighth Amendment to the United States Constitution because the conviction did not necessarily involve a finding of a deliberate taking of human life. Under the instructions given the jury (Tr. pp.360, 362, 366) the jury could have convicted the Petitioner of first degree murder on the basis of a finding either that the Petitioner premeditated the killing of Z. L. Riley or that the Petitioner killed Mr. Riley without a premeditated design during an attempt to rob him.

The jury's verdict is general in nature and does not specify the factual theory on which it concluded that first degree murder occurred (Tr. p. 384). A review of the testimony, however, makes it plain that the jury could have found beyond a reasonable doubt that the killing was premeditated and was committed in the commission of a robbery. It is readily inferable from the confession that after the Petitioner entered Mr. Riley's home and beat him into a state of unconsciousness, he formulated the intent to take Mr. Riley's life to avoid detection.

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There is no authority to support Petitioner's contention that the imposition of a death penalty for such an offense is cruel and unusual. Whether or not the imposition of death for a murder is cruel and unusual within the meaning of the Eighth Amendment depends upon evolving standards of decency. The best evidence, however, of the evolving standards of decency is the fact that the legislatures in numerous states since Furman v. Georgia, 1972, 408 U.S. 238, have enacted statutes which impose the death penalty for killings committed in the commission of serious felonies. (See footnote 23. at page 179 in the opinion of the United States Supreme Court in Gregg v. Georgia, 1976, 428 U.S. 153. Since that opinion was published, the Commonwealth of Massachusetts has adopted capital punishment for first degree murder. See Ch. 488, Mass. Session Laws, 1979.) Additionally, Congress has chosen to provide the death penalty for a killing, whether premeditated or not, caused by one in the commission of air piracy. See 49 U.S.C.A. § 1472(i).

The court has not overlooked the concurring opinion of Mr. Justice White in the case of Lockett v. Ohio, 1978, 438 U.S. 586, 628. The opinion, however, is not binding authority inasmuch as it was a concurring opinion in which no other justice joined.

This court concludes that the second point is without merit as a matter of law.

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Point 3

The third ground for relief is that the trial judge in instructing the jury at the sentencing stage of the trial did not instruct the jury that the aggravating circumstances which justify the death penalty must be proved beyond reasonable doubt. See F.S. 1973, Section 921.141(5). The Petitioner makes the related contention that the trial judge himself did not adhere to this standard of proof. With regard to the latter contention, support for same does not appear from the record of the trial proceedings.

With regard to the instructions to the jury at the sentencing phase of the trial, it is true that the trial judge did not instruct the jury that the aggravating circumstances must be found beyond reasonable doubt. The failure of the court to so instruct the jury was error. See State v. Dixon, Fla. 1973, 283 So.2d 1. It was, however, harmless beyond reasonable doubt.

The aggravating circumstances which were depicted in the record were in fact proved beyond reasonable doubt. The aggravating circumstances were basically the heinousness of the crime which was shown through the Petitioner's own confession and the testimony of the Orange County Medical Examiner, Dr. Hegert (Tr. p. 203); the fact that the Petitioner had been convicted of two prior felonies involving the use or threat of violence to a person, and the fact that the felony was committed

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for pecuniary gain in the course of a robbery and to avoid a lawful arrest. The court concludes that any error of the trial judge in not instructing the jury on the use of the reasonable doubt standard at the sentencing phase of the trial was harmless beyond reasonable doubt.

Point 4

The Petitioner's fourth point is that the trial judge committed error in allowing the jury to consider aggravating circumstances which did not fall within the terms of F.S. 1973, 921.141(5). Section 921.141(5), F.S. 1973,* provided that, "Aggravating circumstances shall be limited to the following (emphasis added) . . ." and then defined eight circumstances which could be considered in favor of imposing the death penalty. Despite the statute's clear wording, the trial judge instructed the jury at the sentencing hearing in part as follows:

> ". . . You will render an advisory sentence to the court based upon the following matters:
>
> Whether sufficient aggravating circumstances exist, or sufficient mitigating circumstances exist for you to recommend the death penalty or life imprisonment.
>
> In considering aggravating circumstances, you shall consider all factors which are aggravating including, but not limited to, the following: . . .".
>
> (Tr. p. 410, emphasis added).

Thereafter, the court's charge delineated the aggravating

---

* The full text of Section 921.141, F.S. 1973, is attached to this Memorandum of Decision as an appendix hereto.

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and mitigating circumstances set out in Section 921.141, F.S. 1973.

The Petitioner contends that the instruction was error because it permitted the jury to consider and base a sentencing verdict on the testimony of Orlando policeman Ronald Ferguson presented at the sentencing hearing. At the sentencing hearing Officer Ferguson, over defense objection (Tr. p. 387), testified about the effort of the Petitioner to avoid arrest. The officer testified that in the course of a fight attendant upon his attempt to arrest the Petitioner, the Petitioner took the officer's gun. At this point the officer ran around his car, crossed the street and jumped a fence. As the officer jumped the fence, Henry fired a shot which hit the officer in the back (Tr. pp.388-389). Thereafter, Henry pursued the officer into Sunset Drive and fired another shot which missed. The officer continued to run, but Henry eventually caught up with the officer and struck him in the forehead with the gun. The gun went off and the concussion knocked the officer to the ground (Tr. pp. 389-390). With the officer on the ground, Henry fired the gun into the officer's right collarbone and immediately fled (Tr. pp.389-390).

The trial court's instruction was erroneous because it did not limit the jury to a consideration of the aggravating circumstances listed in Section 921.141(5), Florida Statutes 1973, and thereby permitted the jury to

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base its sentencing verdict on a non-statutory aggravating circumstance, namely Henry's assault on Officer Ferguson. See Purdy v. State, Fla. 1977, 343 So.2d 4, and Elledge v. State, Fla. 1977, 346 So.2d 998.

The error in the court's charge cannot be ignored on the ground that it was not objected to. The objection raised by counsel for Henry to Officer Ferguson's testimony at the sentencing hearing was sufficient to put the trial court on notice of the defense objection not only to that testimony but to any charge that would permit the jury to consider such testimony (Tr. pp.387-388). The difficult issue is whether or not the trial judge's instruction can be viewed as harmless error beyond reasonable doubt. Harryman v. Estelle, CA5, 1979, 597 F.2d 927.

The trial judge found that none of the statutory mitigating circumstances existed. This finding, however, does not resolve the issue for two reasons. First, under the provisions of Section 921.141, Florida Statutes 1973, the jury is obligated to make an independent analysis of the evidence. In the present case, the jury, as opposed to the trial judge, may well have found some mitigating factor in the evidence. Its vote of seven to five in favor of the death penalty tends to support that possibility. Secondly, even in the absence of mitigating circumstances, the Florida statute does not contemplate the automatic imposition of the death penalty on a finding of one or more aggravating circumstances. As the Florida

Supreme Court pointed out in State v. Dixon, 1973, 283 So.2d 1, 10:

> "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present."

Thus even where only aggravating circumstances are present, the judge and jury must make a reasoned evaluation of the circumstances to determine whether they require the imposition of the death penalty.

The court's instruction to the jury left it free not only to consider non-statutory aggravating circumstances, but matters entirely outside the record. At one point during the course of its deliberations, the jury returned with a question which indicated that it in fact had considered matters outside the record, such as the possibility of release short of the completion of the life sentence.

In Elledge v. State, Fla. 1977, 346 So.2d 998, the defendant was on trial for the murder and rape of a female. Shortly after the murder-rape occurred, the defendant killed a man in a robbery the purpose of which was to obtain funds to escape from the area where the murder-rape was committed. At the sentencing hearing

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which followed his conviction for the murder-rape, evidence of the robbery and the second murder was erroneously admitted for consideration by the jury. The jury by a vote of eleven to one recommended the death penalty and the trial judge so sentenced the defendant. Nevertheless, the Supreme Court of Florida refused to apply the harmless error principle. The Court stated:

> "Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered."

The present case is no more amenable to the application of the harmless error doctrine than Elledge v. State. In the present case, had the jury been properly instructed and guided at the sentencing hearing, it is entirely possible that its recommendation might not have been for the imposition of the capital penalty. In any event, it is clear that the court cannot categorize the error in the jury charge and the admission of Officer Ferguson's testimony at the sentencing hearing as harmless beyond reasonable doubt. For that reason, this court concludes that the State should accord the Petitioner an opportunity for a new sentencing hearing at which the jury will be properly instructed and the evidence as to the assault on Officer Ferguson will be excluded from the

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jury's consideration.

Point 5

Under the fifth point, the Petitioner argues that the trial judge used the underlying robbery along with the pecuniary motive as two aggravating circumstances whereas it should be counted only as one. It is immaterial in the opinion of this court whether the underlying robbery was counted as one or two aggravating circumstances, because only one aggravating circumstance is required to justify the imposition of the death penalty.

The Petitioner also contends under his fifth point that the trial judge limited his consideration of mitigating circumstances to those set out in the statute. This contention is not supported by the record. The trial judge advised the jury that it could consider all circumstances in mitigation (Tr. p. 411) and permitted testimony to be presented by the Petitioner at the sentencing phase with respect to his character and background (Tr. pp. 393-399).

Additionally, under the fifth ground the Petitioner argues that the judge did not find either that the killing was intentional or the aggravating circumstances beyond reasonable doubt.

Suffice it to say at this point that there was no requirement by statute, case law, or Constitution that the trial judge make a finding that the killing was intentional. Secondly, although the judge did not expressly

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state that he found the aggravating circumstances beyond reasonable doubt, it does not follow that this standard of proof was not followed by the judge and jury. The contentions under Point 5 are without merit.

Point 6

Petitioner's sixth point charges that he was denied effective assistance of counsel because counsel failed to ask for an instruction on the burden of proof at the sentencing hearing and failed to object to the trial court's instruction previously quoted with respect to aggravating circumstances.

Constitutionally, the Petitioner is simply entitled to the services of an attorney who is reasonably likely to render effective assistance and who in fact renders reasonably effective assistance. Herring v. Estelle, CA5, 1974, 491 F.2d 125. A transcript of the trial leaves this court with the conclusion that reasonably effective assistance was furnished. The public defender who represented the Petitioner was obviously versed on the law dealing with first degree murder and the sentencing provisions associated therewith, was well versed on the facts of the case, and appropriately cross-examined witnesses for the State.

The failure of counsel to request an instruction that the aggravating circumstances be proved beyond reasonable doubt, as they must be under the case of State v. Dixon, Fla. 1973, 283 So.2d 1, 9, was an understandable

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omission simply because there was no factual issue with respect to the aggravating circumstances. For that reason, counsel's failure did not render him ineffective.

The other omission which is charged as ineffective assistance of counsel is the failure of the public defender to object to the instruction on aggravating circumstances because the instruction did not limit the jury to the aggravating circumstances set forth in the statute. Counsel objected to the testimony of Officer Ferguson at the sentencing hearing (Tr. pp. 387-388). That objection, as noted above, sufficed to put the trial court on notice of the defense objection to the instruction.

Point 7

The seventh point asserted by the Petitioner is that the indictment did not set out the aggravating circumstances on which the State would rely in asking for the death penalty and that the Petitioner was not otherwise given notice of them. This objection is not valid. The Petitioner, like any other person indicted for first degree murder, is put on notice by the statute itself of the aggravating circumstances which may be considered in support of the death penalty.

Point 8

The Petitioner's eighth point is that the death penalty is being capriciously applied in Florida because the Florida Supreme Court employs two vastly different

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standards of review, depending on whether or not the jury recommends life or death.

A review of the two Florida cases on which the Petitioner relies does not support his conclusion. In Tedder v. State, Fla. 1975, 322 So.2d 908, 910, the Florida Supreme Court had before it a case in which the trial judge imposed the death penalty contrary to the jury recommendation. In that case the Court held:

> ". . . A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. . . ."

In LeDuc v. State, Fla. 1978, 365 So.2d 149, 151, wherein the trial judge had sentenced the defendant to death following a jury recommendation consistent therewith, the Florida Supreme Court stated:

> ". . . The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. . . ."

These two opinions do not indicate a substantially different standard of review depending on the jury's finding. The significance of the opinions simply is that jury recommendations should be adhered to unless there is cogent

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reason to believe that the recommendation is inconsistent with the views of reasonable persons. The eighth point is without merit.

Point 9

The Petitioner contends that the Florida death penalty statute is unconstitutional on its face because it does not provide a standard by which the judge and jury can determine whether or not the aggravating circumstances outweigh the mitigating circumstances. The argument, when reduced to its essence, is simply that where the ultimate decision to impose or not to impose the death penalty is vested in the discretion of a sentencer, the death penalty is unconstitutional. This argument has been rejected by the United States Supreme Court where the sentencer's discretion is guided by statutorily articulated standards which in and of themselves are reasonable.

In Gregg v. Georgia, 1976, 428 U.S. 153, 197, the United States Supreme Court in its plurality opinion stated:

> ". . . As a result, while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.' . . ."

Furthermore, Petitioner's contention was implicitly rejected in Proffitt v. Florida, 1976, 428 U.S. 242, wherein six justices of the Supreme Court reviewed the Florida statutory aggravating and mitigating circumstances and

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concluded that they were not so broad as to render the statute unconstitutional.

Point 10

Under his tenth ground, the Petitioner contends that execution by electrocution is cruel and unusual per se and, therefore, a violation of the Eighth Amendment. This claim has been resolved against the Petitioner's position in Ex Parte Kemmler, 1889, 136 U.S. 436.

Under his tenth point, the Petitioner also contends that the death penalty is disproportionately applied in Orange County, Florida. To support this claim, the Petitioner presented the testimony of William Bowers and Glen Pierce. Mr. Bowers, a sociology professor from Northeastern University, testified that he directed a study covering a period from 1973 through 1977 and "the first few months" of 1978. He testified that the study covered thirty-one counties in the State of Florida and focused on the sentencing stage of first degree murder trials.

Glen Pierce, also a sociologist working on a doctorate at Northeastern University, testified that he prepared a statistical analysis of the data gathered by Mr. Bowers. According to the analysis prepared by Mr. Pierce, Orange County, during the study period, returned ninety-two indictments charging first degree murder. According to Mr. Pierce's data, there were thirty-six convictions on these indictments and fifteen death sentences.

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By comparing this data to similar data gathered with respect to other counties, Pierce concluded that in Orange County 16.3% of all capital indictments result in a death sentence, whereas the all-county average was 9.1%. Additionally, he concluded that 41.7% of all convictions in Orange County resulted in the death penalty, whereas 24.3% of the convictions in other counties resulted in the death penalty.

The factual accuracy of the testimony of Mr. Pierce was discredited by the testimony of John Fosnacht. Mr. Fosnacht is the administrative officer in charge of the records of the Felony Division of the Circuit Court for Orange County, Florida. He testified from an examination of the grand jury records for the period from 1973 through 1978 and found that during the study period utilized by Pierce and Bowers, grand juries in Orange County returned one hundred six indictments charging capital felonies - not ninety-two as assumed by Mr. Pierce - and that there were fifty-two convictions - not thirty-six as assumed by Mr. Pierce - and that there were fourteen cases in which the death penalty was imposed - not fifteen as assumed by Mr. Pierce. Thus, using Mr. Fosnacht's figures, the rate at which the death penalty was applied to capital convictions in Orange County would be in line with the rate which Mr. Pierce testified was prevalent throughout the other counties and regions which he studied.

Furthermore, even if the death penalty were

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imposed more frequently in Orange County than in other counties, this fact alone would not warrant a conclusion that the death penalty statute is unconstitutional in its application. The statute contains provisions for a mandatory review by the Florida Supreme Court to avoid disparate application of the statute on a statewide basis. Given this safeguard, the statute in operation is not unconstitutional.

The Petitioner in this case presents an argument with respect to disparate application which was essentially rejected as a matter of law in Spinkellink v. Wainwright, CA5, 1978, 578 F.2d 582, 613. There the Court held:

> ". . . As we previously noted, this Court reads Furman, Gregg, Proffitt, Jurek, Woodson and Roberts as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness - and therefore the racial discrimination - condemned in Furman have been conclusively removed. . . ."

This holding applies equally to discrimination based on geography.

The court concludes that the tenth ground for relief is without merit.

DONE AND ORDERED in Chambers at Orlando, Florida, this 14th day of February, 1980.

H. G. Paul K.
Judge

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80-6369
Case No.

In The

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

ORIGINAL COPY

ANTHONY RAY PEEK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I

WHETHER PETITIONER'S CONVICTION FOR FIRST DEGREE MURDER, SEXUAL BATTERY, GRAND LARCENY, AND BURGLARY VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE STATE'S EVIDENCE FAILED TO PROVE PETITIONER'S GUILT BEYOND A REASONABLE DOUBT?

II

WHETHER THE DEATH SENTENCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL COURT RELIED UPON NONSTATUTORY AND IMPROPER AGGRAVATING CIRCUMSTANCES, AND THE SUPREME COURT OF FLORIDA FAILED TO INSURE CONSISTENCY IN THE ADMINISTRATION OF THE DEATH PENALTY?

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OPINION BELOW

The opinion of the Supreme Court of Florida is as of yet unreported but appears in Appendix A of the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

Respondent does not question the jurisdictional statement as stated in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case.

REASONS FOR DENYING CERTIORARI

QUESTION I

WHETHER PETITIONER'S CONVICTION FOR FIRST DEGREE MURDER, SEXUAL BATTERY, GRAND LARCENY, AND BURGLARY VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECUASE THE STATE'S EVIDENCE FAILED TO PROVE PETITIONER'S GUILT BEYOND A REASONABLE DOUBT.

The question presents no significant constitutional question for the Court to consider. That the Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt is not disputed. In Re Winship, 397 U.S. 358 (1970). That is precisely the standard followed by the Florida Supreme Court in the instant case ("A" A-4).

Petitioner may not agree that the evidence sufficed beyond a reasonable doubt, but his opinion which he now asks the Court to accept varies with the opinion of a twelve person jury, a trial judge and five justices of the Supreme Court of Florida. Should the Court grant the writ it would not decide any

unsettled federal question nor set out any new standard to follow in criminal jurisprudence. What petitioner asks is for the Court to review the entire trial record and determine whether the evidence suffices under that standard. Hardly a matter that should be considered by the Court.

Petitioner argues that the decision of the Supreme Court of Florida conflicts with Jackson v. Virginia, 443 U.S. 307 (1979). It does not. The question in that case was what the standard was to be applied in a federal habeas corpus proceeding when the claim is made that a person has been convicted in state court upon insufficient evidence. This case has not been through federal habeas proceedings. If and when it does we feel confident that the federal court that hears the matter will follow the standard enunciated by the Court in Jackson v. Virginia.

QUESTION II

WHETHER THE DEATH SENTENCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL COURT RELIED UPON NONSTATUTORY AND IMPROPER AGGRAVATING CIRCUMSTANCES, AND THE SUPREME COURT OF FLORIDA FAILED TO INSURE CONSISTENCY IN THE ADMINISTRATION OF THE DEATH PENALTY.

The primary problem with the question as presented by petitioner is that it incorrectly assumes that reliance was had on nonstatutory or improper aggravating circumstances in upholding the sentence of death. This is incorrect. The Supreme Court of Florida found that two of the aggravating circumstances which were found by the trial judge to exist were improperly considered because the facts supporting them did not fall within the legislative intent as to what constituted those two aggravating circumstances. The two were: (a) that the offense

was committed for pecuniary gain and (b) that petitioner was under a sentence of imprisonment at the time that petitioner committed the instant offense. As to (a) above the court held that although the victim's purse was ransacked and automobile taken, there was no evidence to establish petitioner intended to profit from his crime. As to (b) the court held that one on probationary status is not under a sentence of imprisonment.

After striking these two aggravating circumstances from the equation the Florida Supreme Court determined that the sentence was proper because there remained three aggravating circumstances, which outweighed the mitigating since there were none.

Petitioner suggests that the procedure violates the cruel and unusual punishment clause of the Eighth Amendment, but fails to explain how it is so unstructured as to create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.

The fact is that Florida's procedure is sufficiently structured, Proffitt v. Florida, 628 U.S. 242 (1976). Since it is a weighing and not a counting process, State v. Dixon, 283 So.2d 1 (Fla. 1973), it matters not whether there are five aggravating circumstnaces or three as long as the aggravating outweigh the mitigating. When there are no mitigating the aggravating will always outweigh, Alford v. State, 307 So.2d 433 (Fla. 1975).

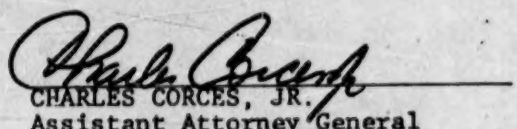
Florida's procedure has already been considered and approved by the Court in Proffitt, supra. In granting certiorari in the instant case the Court will do no more than revisit Proffitt.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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